

Taboola, Inc. v RedOrbit, Inc.
2017 NY Slip Op 32489(U)
November 17, 2017
Supreme Court, New York County
Docket Number: 651410/2017
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

TABOOLA, INC.,

Plaintiff,

-against-

REDORBIT, INC., ERIC C. RALLS, and
SCIENCE MATTERS MEDIA, LLC.,

Defendants.

Index No.: 651410/2017

DECISION/ORDER

Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants RedOrbit, Inc. and Eric C. Ralls' motion to dismiss the complaint

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Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Steven D. Sladkus and Jared E. Paioff of counsel), for plaintiff.

Law Office of Barry E. Janay, P.C., New York (Barry E. Janay of counsel), for defendants RedOrbit, Inc. and Eric C. Ralls.

Gerald Lebovits, J.

This is an alleged breach-of-contract case between plaintiff Taboola, Inc. (Taboola), a digital advertising company, and defendants RedOrbit, Inc. (RedOrbit), a science-based website; Eric C. Ralls, the President of RedOrbit; and Science Matters Media, LLC (Science Matters), RedOrbit's successor company. Plaintiff and defendant Ralls entered into a contract for plaintiff to install its advertising program on RedOrbit's website in return for monthly and cost-per-click payments. Plaintiff alleges that RedOrbit defaulted on the contract and owes an outstanding invoice balance of \$51,618.00. Ralls later sold RedOrbit to Science Matters. Plaintiff asserts in its complaint the following: (1) Ralls is personally liable for RedOrbit's breach of contract; (2) the subsequent sale of RedOrbit to Science Matters was constructively and intentionally fraudulent; and (3) Science Matters is liable for RedOrbit's debts because it assumed those debts in connection with its acquiring the company.

RedOrbit and Ralls move under CPLR 3211 to dismiss plaintiff's complaint in its entirety. Although RedOrbit and Ralls do not state under which provision under CPLR 3211 they

move, the court interprets defendants' motion as a motion to dismiss for failure to state a cause of action under CPLR 3211(a) (7). RedOrbit and Ralls also move under CPLR 3211 (a) (8) to dismiss the case against Science Matters Media because this court allegedly lacks jurisdiction over it. Plaintiff opposes the motion.

I. Defendants' Motion to Dismiss the Complaint under CPLR 3211 (a) (7)

RedOrbit and Ralls move to dismiss all five causes of action in plaintiff's complaint under CPLR 3211 (a) (7). On a motion to dismiss under CPLR 3211 (a) (7), a court must give the plaintiff the benefit of every possible favorable inference that a cause of action exists. (*Rovello v Orofino Realty Co.*, 490 NY2d 633, 636 [1976].) A court is "not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]; *accord Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].)

Breach of Contract

RedOrbit and Ralls' motion to dismiss the complaint on plaintiff's breach of contract claim is denied. First, defendants argue that Ralls is not personally liable for RedOrbit's breach of contract. The legal standard for personal liability of corporate officers is generally that "persons may not be held personally liable on contracts of their corporations, provided they did not purport to bind themselves individually under such contracts." (*Wiernik v Kurth*, AD3d 535, 537 [2d Dept 2009].)

Assuming that plaintiff's factual contentions are true, plaintiff establishes a cognizable cause of action for personal liability against Ralls by providing evidence of his personal signature on the contract agreement and alleged email exchanges that purport to bind him individually to RedOrbit's debts. Defendants RedOrbit and Ralls' argument that plaintiffs are inappropriately attempting to "pierce the corporate veil" and establish "alter ego" liability might have merit, but this argument is premature to extinguish plaintiff's claim on this preliminary motion.

Second, RedOrbit and Ralls argue that Science Matters, RedOrbit's successor company, is not liable because it did not assume the debts and obligations from its acquisition of RedOrbit. The legal standard for successor liability is stated in *Oorah, Inc. v Covista Communications, Inc.* (139 AD3d 444, 445 [1d Dept 2016]) as follows:

"In general, a corporation that acquires the assets of another is not liable for its predecessor's breaches of contract; exceptions exist where the corporation [1] impliedly assumed its predecessor's liability, [2] there was consolidation or merger of seller and purchaser, or [3] the transaction is entered into fraudulently to escape the predecessor's obligations."

Here, plaintiff does not allege any facts that Science Matters impliedly assumed RedOrbit's liability or that the acquisition resulted from a consolidation or merger between RedOrbit and Science Matters. Plaintiff does allege causes of action against defendants for fraudulent conveyances, and the court presumes that plaintiff is relying on the third exception of the rule for successor liability to support plaintiff's claim. Plaintiff alleges sufficient fraudulent-transfer claims, discussed below.

Defendants' motion to dismiss plaintiff's breach-of-contract cause against Ralls and Science Matters is denied.

Account Stated

RedOrbit and Ralls' motion to dismiss the account-stated cause of action is denied. A cause of action to recover an account stated "'sound[s] in breach of contract . . . and arises from some indebtedness between the parties.'" (*Racwell Const., LLC v Manfredi*, 61 AD3d 731, 734 [2d Dept 2009] [citations omitted].) The mere rendering of an account does not make it a stated one, but

"where an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown." (*Paterson v IBJ Schroder Bank & Trust Co.*, 172 AD2d 165, 166-167 [1st Dept 1991]; *accord Lockwood v Thorne*, 11 NY 170, 170 [1854].)

The facts and circumstances surrounding the breach of contract between defendants Redorbit and Ralls and plaintiff is contested, and plaintiff alleges that defendants owe \$51,618.00 in outstanding invoices. According to plaintiff, RedOrbit and Ralls did not object to the outstanding balances or raise any defensible equitable considerations.

Defendants' motion to dismiss plaintiff's account stated cause of action is denied.

Constructive Fraudulent Conveyance While Insolvent

RedOrbit and Ralls' motion to dismiss plaintiff's third cause of action against Ralls for constructive fraudulent conveyances while insolvent in the sale of RedOrbit to Science Matters is denied. Debtor & Creditor Law § 273, which governs constructive fraudulent conveyances while insolvent, provides the following:

"Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

A court may determine what is fair consideration for a conveyance by looking to the “facts of each particular case” in which there is an alleged fraudulent conveyance. (*Peterson v Vallenzano*, 849 F Supp 2d 228, 231 [SDNY 1994]; *accord Colombo v Caiati*, 129 Misc 2d 338, 340 [Sup Ct, Rockland County 1985], citing *Gelbard v Caiati*, 96 AD2d 573, 575-576 [2d Dept 1983], *aff’d* 131 AD2d 532 [2d Dept 1987].)

Plaintiff alleges in its complaint that Science Matters acquired RedOrbit and the entirety of its assets and that RedOrbit retained little, if any, of the proceeds of that acquisition. Plaintiff further alleges that any proceeds retained from Science Matters acquisition of RedOrbit were distributed to Ralls and RedOrbit’s shareholders. Plaintiff argues that these equity distributions were transfers of RedOrbit’s property made without fair consideration and rendered RedOrbit insolvent when some or all the equity distributions were made. Assuming that plaintiff’s contentions are true, the complaint pleads the elements of a legally cognizable cause of action for constructive fraudulent conveyance while insolvent. Defendants’ motion to dismiss this cause of action is denied.

Constructive Fraudulent Conveyances Causing Unreasonably Small Capital

RedOrbit and Ralls’ motion to dismiss plaintiff’s fourth cause of action against Ralls for constructive fraudulent conveyances causing unreasonably small capital is denied. Debtor & Creditor Law § 274, which governs constructive fraudulent conveyances causing unreasonably small capital, provides the following:

“Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.”

Here, plaintiff alleges that some or all of the equity distributions were made while RedOrbit was engaged in, or was about to be engaged in, a business or transaction for which the property remaining in its hands after such distributions would leave it with an unreasonably small amount of capital. Specifically, plaintiff argues that RedOrbit made distributions of the proceeds from its sale to Ralls and other shareholders without fair consideration and leaving the company with little money to meet its debts and financial obligations. Assuming that plaintiff’s contentions are true, plaintiff has sufficiently pleaded this cause of action. RedOrbit and Ralls’ motion to dismiss is denied.

Intentional Fraudulent Conveyance

RedOrbit and Ralls’ motion to dismiss plaintiff’s fifth cause of action against Ralls for intentionally fraudulent conveyance is denied. Debtor & Creditor Law § 276, which governs intentional fraudulent conveyances, provides the following:

“Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”

Under DCL § 276, unlike sections 273 and 275, a plaintiff must show actual fraud, and not constructive fraud; plaintiff need not show proof of unfair considerations or insolvency. (*See Wall Street Assocs. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]; *accord United States v Carlin*, 948 F Supp 271, 277 [SDNY 1996].) Because of the “difficulty of proving actual intent to hinder, delay, or defraud creditors, a plaintiff is allowed to rely on ‘badges of fraud’ to support its case, i.e., circumstances so commonly associated with fraudulent transfers ‘that their presence gives rise to an inference of intent.’” (*MFS/Sun Life Trust- High Yield Series v Van Dusen Airport Servs. Co.*, 910 F Supp 913, 935 [SDNY 1995]; *accord Wall Street Assocs.*, 257 AD2d at 529.) A plaintiff must show the following circumstances: a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequate consideration; the transferor’s knowledge of the creditor’s claim and the inability to pay it; and the retention of control of the property by the transferor after the conveyance. (*Wall Street*, 257 AD2d at 529.)

Here, plaintiff alleges that RedOrbit intentionally distributed and transferred to Ralls and RedOrbit’s other shareholders the proceeds of the sale of RedOrbit’s assets with an actual intent to hinder, delay, and defraud RedOrbit’s creditors. Plaintiff argues in its opposition papers that defendants failed to proffer any evidence demonstrating that Ralls did not receive the distributions without fair consideration or that RedOrbit is solvent. Plaintiff raises multiple arguments in its opposition papers, namely that defendant Ralls’ own affidavit admits that Ralls was the majority shareholder of RedOrbit and was aware of the outstanding invoices owed. Ralls, while still aware of the outstanding invoices, sold RedOrbit and all its assets to Science Matters and is now insolvent and defunct. Plaintiff has satisfied the liberal-pleading standard in its complaint. Defendants’ motion to dismiss this cause of action is denied.

II. Defendant’s Motion to Dismiss Plaintiff’s Complaint Against Defendant Science Matters

RedOrbit and Ralls motion to dismiss the complaint against Science Matters is denied. RedOrbit and Ralls move to dismiss the complaint against Science Matters under CPLR 3211 (a) (8), arguing that plaintiff failed to serve Science Matters with any summons or complaint. CPLR 3211 (a) (8), which governs dismissal for lack of jurisdiction, provides the following: “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the party has not jurisdiction of the person of the defendant.”

RedOrbit and Ralls have no standing to assert a personal jurisdiction defense on behalf of Science Matters because it is not their defense. It is Science Matters’s defense. And Science Matters is not moving to dismiss on this basis. Therefore, the motion to dismiss the complaint against Science Matters is denied.

NYSCEF DOC. NO. 17

RECEIVED NYSCEF: 11/28/2017

Accordingly, it is hereby

ORDERED that defendants RedOrbit, Inc., and Eric C. Ralls motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on all parties; and it is further

ORDERED that the parties appear for a preliminary conference on December 13, 2017, at 11:00 a.m., in Part 7, room 345, at 60 Centre Street.

Dated: November 17, 2017



J.S.C.

HON. GERALD LEOVITS
J.S.C.